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Nos. 78-271 and 78-469

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANDREW DINKO, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICIA DINKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (Pet. App. 14-16)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1978. Petitions for rehearing were denied on

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[1]"Pet. App." refers to the appendix in No. 78-271

July 11, 1978 (Pet. App. 17-20). The petition for a writ of certiorari in No. 78-271 was filed on August 17, 1978, and the petition in No. 78-469 was filed on September 19, 1978. Both petitions are therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, in a joint trial in which each was separately represented, were denied the effective assistance of counsel because only one of the petitioners' attorneys actively presented the joint defense at trial.

2. Whether the quality of petitioners' representation at trial was so low as to deny them the effective assistance of counsel.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of possession of heroin and conspiracy to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Andrew Dinko was sentenced to a five-year term of imprisonment, to be followed by five years of special parole. His wife, petitioner Patricia Dinko, was sentenced to five years' imprisonment, the execution of which was suspended. She was placed on probation for five years, sentenced to a five-year term of special parole, and fined $3,000. The court of appeals affirmed by order (Pet. App. 14-16).

In September 1971 and for some time thereafter, petitioners operated a heroin distribution business from their home in Queens, New York. Among their customers was Charles Johnson, who purchased substantial quantities of heroin from the Dinkos on various occasions between 1971 and 1973 (Tr. 38-109). During these sales to Johnson, Patricia Dinko measured out the drugs while Andrew Dinko collected the money (Tr. 73, 75).

In April 1973, Johnson became a middleman for the sale of heroin by the Dinkos to undercover narcotics agents, who were posing as out-of-town drug dealers (Tr. 80-88). In return for an ounce of heroin supplied to him by petitioners, Johnson received $1,200 from Drug Enforcement Administration agent Henry Segar (Tr. 88-90). In September 1973, Johnson was given $2,000 by Segar as partial payment for an eighth of a kilogram of heroin. Johnson went to the Dinkos' home, where he exchanged the money for a package containing the drugs. He delivered the package to Segar, who in turn paid Johnson the balance of $2,500, for transmittal to petitioner Andrew Dinko (Tr. 96-103).[2]

The testimony of the undercover agents and a police officer who had maintained visual surveillance of the Dinko residence corroborated Johnson's account of his dealings with the agents during the period from April to November 1973 (Tr. 203-275, 353-370, 377-399). Furthermore, the agents related numerous statements by Johnson and other narcotics dealers made during the course of the undercover operation, implicating the Dinkos in the heroin distribution conspiracy (Tr. 210, 222, 240). In a recorded telephone conversation, co-defendant Joseph Boyd, also a drug trafficker, provided Segar with a telephone number that he said belonged to his heroin supplier (Tr. 264-269). The telephone number was that of the Dinko residence (Tr. 404-405). Segar ultimately was able to arrange a face-to-face meeting with Patricia Dinko. During this encounter, the parties discussed Segar's proposed purchase of a full kilogram of heroin and agreed upon a tentative purchase price.[3] The sale was never consummated, however, as the DEA did not release the necessary funds (Tr. 269-275).

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[2] This transaction was the basis of the substantive possession count against petitioners.

[3] Petitioner Andrew Dinko was observed maintaining surveillance while his wife and Segar were engaged in conversation (Tr. 402-403).

Testifying in her own behalf, Patricia Dinko provided a defense for both herself and her husband, who did not testify. According to Mrs. Dinko, her encounter with undercover agent Segar was a consequence of her husband's bitterly contested and unsuccessful quest for the presidency of the National Maritime Union. She testified that a campaign worker informed her that certain drug dealers were trying to contact the Dinkos in order to purchase drugs from them (Tr. 498-500). Since Patricia Dinko maintained that neither she nor her husband had ever had any involvement with drugs, she suspected that the reported effort by narcotics distributors to reach Andrew Dinko was part of a scheme devised by Dinko's union opponents to discredit him by linking him with the drug trade (Tr. 474-475, 481, 512-516). Accordingly, she acknowledged that she had arranged a meeting with Segar, but she contended that she had met with him only to determine whether he was acting for union officials (Tr. 479, 546-550).

At trial petitioners were separately represented by retained attorneys. Salvatore Quagliata served as counsel for Andrew Dinko, and Thomas Manning represented Patricia Dinko. Both attorneys were present throughout the trial (Tr. 2, 146, 320, 425, 588, 665), although Quagliata conducted the actual proceedings in the courtroom on behalf of both defendants.

ARGUMENT

1. Petitioners contend that they were denied the right to the effective assistance of counsel by virtue of the fact that one attorney actively presented their joint defense at trial. There is no merit to this contention.

The record reflects that from the first day of trial, Thomas Manning represented petitioner Patricia Dinko and Quagliata represented petitioner Andrew Dinko. Manning was continuously present in the courtroom for the duration of the trial. The fact that petitioners

apparently determined that one attorney would handle the trial proceedings does not constitute a denial of representation by the other attorney.

Under the circumstances, it is reasonable to assume that a determination was made that the Dinkos' interests would best be served by presenting a united front to the jury. The election to have only one lawyer present the defense case was a reasonable tactical decision that cannot be said to have denied either petitioner the constitutional right to effective representation.

Far from being prejudiced, the Dinkos gained a decided benefit by pursuing a unitary defense.[4] There was no plausible defense tactic that would have permitted either petitioner to minimize his or her involvement at the expense of the other. The record shows that there was not a single narcotics transaction or meeting shown by the prosecution's evidence in which both Dinkos did not participate. Although petitioner Andrew Dinko contends that he was prejudiced when his wife testified at trial while he did not, the pursuit of a joint defense in fact enabled Andrew Dinko to benefit from his wife's testimony without exposing himself to cross-examination. Patricia Dinko's testimony was entirely consistent with her husband's defense that the two were in no way involved in a drug conspiracy and that they were circumstantially implicated—by virtue of Patricia's meeting with Segar—only as a result of her good-faith effort to forestall an attack upon her husband's character by rival union officials. Mrs. Dinko clearly sought to exculpate her husband, steadfastly maintaining that he had no associa-

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[4]Even if petitioners had been represented by a single attorney, the mere fact of joint representation is not *per se* violative of constitutional guarantees of effective assistance of counsel. As this Court has stated recently, "in some cases, certain advantages might accure from joint representation." *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978).

tion with drugs or the drug trade. Accordingly, Patricia's testimony was as helpful to her husband as it could possibly have been under the circumstances.

The risks inherent in cases of joint representation of two or more defendants by a single attorney do not apply in cases such as this one, where separately represented defendants elect to pursue a joint defense. While we believe that in cases of proposed joint representation, the court should carefully inquire into the defendants' waiver of their right to separate representation, a similar pretrial inquiry into the selection of defense strategy would plainly be improper.[5] Of course, if the election of a joint defense in fact resulted in the lead attorney's using the occasion to save his client at the expense of the other defendant, the attorney for the victimized defendant would have an obligation to protect his client, just as he would in any case in which one defendant seeks to exculpate himself by implicating his co-defendants. In this case, however, that did not happen at all. Instead, the Dinkos' joint defense remained unitary from opening statement through summation. Thus, the principles applicable in joint representation cases are not controlling here.

2. Petitioners also contend that the quality of their representation at trial was so low as to compel the reversal of their convictions. This claim is without merit. While petitioners list several alleged defects in the conduct of the defense at trial, it is highly unlikely that any of

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[5]Petitioner Patricia Dinko suggests that the court should have conducted a waiver hearing at the point that counsel stated in opening statement that both defendants would testify. We do not know what there is about such a statement that should trigger an inquiry by the court. In any event, however, in this case counsel did *not* state that both defendants would testify. Instead, he stated that the jury would hear "exactly what happened from the mouth of the defendants" (Tr. 24) and later added that he didn't know "whether one [or] both of them will testify, but you'll hear from the defense. Those people, probably both, maybe one will be enough" (Tr. 32).

these purported defects in any way prejudiced petitioners. The detailed opening statement by defense counsel makes it clear that the defense was well aware of the nature of the case against petitioners and suggests that discovery motions would have served no useful purpose. Similarly, in light of the strength of the government's direct case, a motion for a directed verdict of acquittal would have been a mere formality, with no real prospect of success. And the failure to request a poll of the jury after the return of the verdict is easily explained by the fact that the clerk conducted a poll, making any request unnecessary (Tr. 776-778).

Both petitioners additionally contend that the ineffectiveness of their representation was manifested by their counsels' failure to seek suppression of prosecution evidence acquired through electronic surveillance. The only evidence of this nature presented by the government was the recorded telephone conversation between Agent Segar and Joseph Boyd, a drug distributor and associate of the Dinkos (Tr. 263-264, 268). But such a motion would plainly have been futile. It is well established that a government agent's consent to recording a conversation of his with another party obviates the need for prior court authorization. 18 U.S.C. 2511(2)(c); see *United States* v. *White*, 401 U.S. 745, 751 (1971); *United States* v. *Ryan*, 548 F. 2d 782, 787-788 (9th Cir. 1976), cert. denied, 429 U.S. 939 (1977); *United States* v. *Bloom*, 538 F. 2d 704, 711 (5th Cir.), cert. denied, 429 U.S. 1074 (1976). Moreover, neither petitioner would have standing to move for the suppression of the conversation between Boyd and Agent Segar. The failure to make hopeless motions does not establish ineffective assistance of counsel. See, *e.g.*, *United States* v. *Yanishefsky*, 500 F. 2d 1327 (2d Cir. 1974); *United States* v. *Martin*, 489 F. 2d 674 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974); *United States* v. *Smith*, 551 F. 2d 348, 353-354 & n.7 (D.C. Cir. 1976); *Cheeley* v. *United States*, 535 F. 2d 934,

936 (5th Cir. 1976). In sum, petitioners have failed to show that their representation was not within the "range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970).

Because petitioners have not shown their representation to have been inadequate in any significant respect, this case does not present an appropriate occasion for resolving the conflict among the various courts of appeals regarding the standard for testing the adequacy of representation in criminal cases. Even assuming that the difference in the standard reflects more than merely a difference in verbal formulation, the performance of counsel in this case would apparently have satisfied even the assertedly more rigorous "reasonably competent" assistance standard employed in some circuits.[6]

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[6]This is the formulation of the test adopted by four circuits. *United States* v. *DeCoster*, 487 F. 2d 1197, 1202 (D.C. Cir. 1973); *Marzullo* v. *Maryland*, 561 F. 2d 540, 543 (4th Cir. 1977), cert. denied, May 1, 1978 (No. 77-784); *United States* v. *Fessel*, 531 F. 2d 1275, 1278 (5th Cir. 1976); *United States* v. *Easter*, 539 F. 2d 663, 665-666 (8th Cir. 1976). In addition to the Second Circuit, the First and Tenth Circuits adhere to the traditional "farce and mockery" standard. *United States* v. *Madrid Ramirez*, 535 F. 2d 125, 129-130 (1st Cir. 1976); *Gillihan* v. *Rodriguez*, 551 F. 2d 1182, 1187 (10th Cir.), cert. denied, 434 U.S. 845 (1977). The Third Circuit requires that counsel exercise the level of skill and knowledge customary to the time and place of representation (*Moore* v. *United States*, 432 F. 2d 730, 736 (1970)), and the Seventh requires representation exceeding minimum standards of professional competency (*United States* v. *Brugger*, 549 F. 2d 2, 4, (7th Cir), cert. denied, 431 U.S. 919 (1977)). The Ninth Circuit has not yet settled on a formulation. Compare *Saunders* v. *Eyman*, No. 75-3485 (April 18, 1977) (farce and mockery test) with *Cooper* v. *Fitzharris*, 551 F. 2d 1162, 1165-1166 (1977) (reasonably effective assistance), rehearing en banc granted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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